IN THE

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# Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1214

IOWA BEEF PROCESSORS, INC., et al.,
*Petitioners,*

vs.

MEAT PRICE INVESTIGATORS ASS'N.,
DARRELL CAMERON, and DON LUDVIGSON, et al.,
*Respondents.*

## JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT


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## JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The undersigned respondents respectfully request the Court to deny the petition for a writ of certiorari to review the judgment, entered on November 26, 1979, in the United States Court of Appeals for the Fifth Circuit.

## JURISDICTION

Respondents acknowledge the jurisdiction of this Court with respect to the appeal of Petitioners Farr Farms Company and Farr Feeders, Inc. ("Farr") from the order approving the Spencer Foods settlement and dismissing all claims against Spencer Foods. However, this Court is without jurisdiction to consider the following:

**1. The issues raised by IBP and MBPXL relative to the Spencer Foods settlement (Appeal No. 78-3345).** Petitioner MBPXL was not a party to that appeal. The appeal of Petitioner IBP was dismissed by the Fifth Circuit for lack of standing and lack of an appealable order. Neither of those petitioners seek review of those determinations in their Petition for Writ of Certiorari; and this Court should therefore decline to review the dismissal of that appeal. *Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972); *Ryan v. United States*, 379 U.S. 61 (1964).

**2. All issues relative to the Flavorland settlement (Appeal No. 79-1010).** Petitioner Farr was not a party to that appeal. The Fifth Circuit dismissed the appeals of Petitioners IBP and MBPXL for lack of standing and lack of an appealable order. Neither of those petitioners seek review of those determinations in their Petition for Writ of Certiorari; and this Court should therefore decline to review the dismissal of that appeal. *Andrews v. Louisville & Nashville R.R., supra*; *Ryan v. United States, supra.*

**3. All issues relative to the availability of contribution among antitrust action defendants (Appeal No. 78-3346).** The issues are presented in this case only by virtue of the order denying the motion of IBP to amend its Answer, and that order is clearly not appealable.

## QUESTIONS PRESENTED

1. Do non-settling defendants have standing to object to the partial settlement of antitrust damage actions?

2. Should this Court grant certiorari to review the holding of the Fifth Circuit that the Flavorland settlement order was not appealable where it merely conditionally approved the temporary settlement class and the proposed settlement, subject to final approval after hearing on notice to class members.

3. Should this Court grant certiorari to review the propriety of a negotiated partial settlement, in an action certified as a class action for settlement purposes, where the petitioner member of the plaintiff class: (a) has stated his opposition to the commencement and maintenance of the lawsuit; (b) is not seeking a larger settlement amount; and (c) has not expressed a willingness to represent the class?

4. Should this Court grant certiorari to review the affirmance of an order denying a motion to amend an answer to assert a crossclaim for contribution against a settling antitrust defendant where no Circuit Court has recognized an action for contribution against a settling co-defendant and where the motion to amend was filed solely as a tactic to prevent settlement?

## STATEMENT OF THE CASE

The three cases before this Court are part of the consolidated proceedings of the "packer" and "retailer" cases in *In Re Beef Industry Antitrust Litigation, M.D.L. No. 248,* pending before the Honorable William M. Taylor, Jr. in the Northern District of Texas, Dallas Division. The plaintiffs in these cases are cattlefeeders. In the "retailer" aspect of the

litigation plaintiffs are suing large retail food chains, and here, in the "packer" aspect, plaintiffs are suing various beef packers. The three cases comprising the packer side are (1) *Meat Price Investigators Association, ("MPIA"), et al. v. Iowa Beef Processors, Inc. ("IBP") et al.*, (2) *Cameron, et al. v. IBP, et al.*, and (3) *Ludvigson, et al. v. IBP, et al.* In this latter case, four named plaintiffs seek to represent a nationwide class of sellers of "fat cattle." The three "packer" cases were filed in the Southern District of Iowa and were transferred by the Judicial Panel on Multidistrict Litigation for consolidated and coordinated pretrial proceedings with the previously filed "retailer" cases.

The Complaints in the three "packer" cases allege violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2), and seek treble damages and injunctive relief (15 U.S.C. §§15 and 26). Virtually the same operative facts and violations are asserted against the defendants in the three cases. The defendants in each of these cases include four beef packers: IBP, MBPXL, Spencer Foods, and Flavorland. The packer-petitioners which opposed the settlements below are IBP, by far the largest beef packer in the United States, and MBPXL, another major beef packer. Respondents, the settling packers, are far smaller than either IBP or MBPXL.[1]

**Spencer Foods Settlement**

Settlement negotiations among plaintiffs and Spencer Foods commenced in February, 1978 and intensive negotiations were conducted on virtually a daily basis for three weeks. Judge Taylor was periodically advised of the potential settlement

[1] In 1977 Spencer lost over two million dollars; IBP had a net profit of thirty million dollars. Based upon net worth IBP was over 10 times larger than Spencer. (A-40) (All citations are to the appendix to the Petition herein.)

and the ongoing status of the negotiations. When an agreement was reached, the settlement documents were provided to the Court for its review. The Court made limited recommendations which resulted in certain modifications. By the terms of the ultimate settlement agreement, Spencer agreed to pay plaintiffs the sum of $425,000 and to make its records and employees available for discovery, in return for which plaintiffs agreed to dismiss all their claims against Spencer. The settlement was conditioned upon judicial approval following notice to the class and a hearing in accordance with Rule 23(e), Federal Rules of Civil Procedure. On May 25, 1978, the district court entered an order conditionally approving the temporary settlement class, conditionally approving the proposed settlement, directing the mailing of notice to the class, proposing the form and method of notice, and scheduling a hearing for August 11, 1978. (A-5). The notices, mailed to 54,804 persons on June 20, 1978, stated, *inter alia*, that the entire settlement fund might be used for litigation expenses and that class members had the option of opting out or of appearing by separate counsel at the August 11, 1978 hearing.

The August 11, 1978 hearing lasted a full day. The court heard live testimony from several witnesses, received a report from counsel for plaintiffs as to the dissemination of the notice and as to the small percentage of opt-outs,[2] took judicial notice of the discovery which had been taken on the class certification issue in the "retailer" phase of the litigation, and heard several hours of oral argument from all parties who wished to be heard (including counsel for objector Farr and for each of the non-settling defendants.) Of particular significance was the testimony of Spencer's executive vice president, who informed the court of Spencer's deteriorating fi-

[2] Fewer than two percent. (A-40)

nancial condition[3] which rendered it unable to make a larger settlement payment. He also testified that Land O'Lakes, a leading agriculture cooperative, had made a tender offer for all of Spencer's stock, contingent upon settlement of the antitrust litigation. The reopening of Spencer's principal slaughter facilities at Spencer, Iowa, under Land O'Lakes management was one of the many benefits plaintiffs would receive from the settlement, since the closing of that plant had left IBP the only beef purchaser available to many class members.

Although objections from three class members had been filed,[4] only William Farr (on behalf of Petitioners Farr) elected to present evidence in support of his "objections to the settlement." Farr, however, did not object to the merits of the settlement, was opposed to the litigation as being harmful to the cattle industry, and believed there was no factual basis for the lawsuit. (A58-59). Farr did not elect to "opt-out" of the class, nor did Farr offer to represent the class as an alternative to representation by the named plaintiffs.[5]

On August 21, 1978, Judge Taylor entered an order approving the Spencer settlement and certifying a class solely for purposes of that settlement. The Court specifically found that the settlement was "fair, adequate and reasonable, [not] collusive, and reflected a bona fide compromise of a genuine dispute bearing all normal perils of litigation as well as the additional uncertainties inherent in a complex class action." (A-20)

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[3] It had closed all but one of its seven operating facilities.

[4] Including one from Edward Rothe, who objected to the proposed settlement as a plaintiffs' class member while presenting arguments as counsel for the principal nonsettling defendant (IBP).

[5] On cross-examination, for example, W. D. Farr testified that he did not agree with the complaint in the packers case because he didn't believe there was any basis for it. In an affidavit filed several months prior to settlement, Farr stated: "I am opposed to these lawsuits. I believe they are harmful to cattlemen, they fail to deal with the problems of the cattle industry, and that there is no factual basis for the lawsuit." (A58-59)

**Flavorland Settlement**

In late 1978 Flavorland and plaintiffs negotiated a proposed settlement which was then submitted to the trial court for preliminary review. On December 31, 1978 the trial court issued its order conditionally determining a Flavorland temporary settlement class and tentatively approving a proposed Flavorland settlement which provided for the payment of $750,000 in exchange for the dismissal of all claims against Flavorland. (A23-27). At the time it issued this order, the district court had before it the full record of the Spencer settlement proceedings. It also had before it the record which IBP and MBPXL had made in the course of a week-long evidentiary hearing in early December, 1978, on the certification of a litigation class against the nonsettling defendants. The Fifth Circuit granted the motion of IBP to stay the mailing of notice of this tentative settlement, pending a hearing of the appeal of IBP and MBPXL. Consequently, no notice of the Flavorland settlement has yet been mailed to class members, no settlement hearing has been held, and the district court has not yet finally approved the proposed Flavorland settlement or the proposed Flavorland settlement class.

**The Prior Involvement of the District Court**

The district court had been extensively involved in various aspects of the Beef Industry Antitrust Litigation prior to its approval of the Spencer Foods settlement and its tentative approval of the proposed Flavorland settlement. Judge Taylor presided over one of the "retailer" cases, *Becker, et al. v. Safeway Stores, Inc., et al.*, which involved class allegations substantially identical to those asserted in the *Ludvigson* packer case. There had been substantial activity in the *Becker* litiga-

tion on the propriety of the plaintiff class, including extensive discovery, briefing and oral argument before Judge Taylor. Judge Taylor took judicial notice of the entire *Becker* record, including all discovery on the certification issue.

**IBP's Motion To Amend Its Answer**

On August 7, 1978, almost two years after commencement of the *MPIA* action and only four days prior to the hearing on the Spencer Foods settlement, defendant IBP moved for leave to amend its answer to assert a crossclaim against Spencer for contribution.[6] The trial court entered an order on September 1, 1978 denying IBP's motion to amend.

## I. PETITIONERS IBP AND MBPXL LACK STANDING TO APPEAL THE SETTLEMENTS.

The appeals of IBP and MBPXL relative to the Spencer Foods and Flavorland settlements were dismissed by the Fifth Circuit on the ground, *inter alia*, that both IBP and MBPXL, as non-settling defendants, lacked standing to appeal.[7] This dismissal by the Fifth Circuit involved the routine application of established principles of law which does not warrant the discretionary review of the Supreme Court.

Few propositions would seem more basic than the one articulated by the district court and the Fifth Circuit herein:

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[6] Employing similar tactics, IBP moved on January 3, 1979—less than two weeks after entry of the order conditionally approving the Flavorland settlement—for leave to amend its answers to assert crossclaims for contribution against Flavorland. The district court has not yet ruled on this motion. IBP has not attempted to assert crossclaims against *any* non-settling defendant.

[7] The standing of MBPXL was considered only in connection with the Flavorland settlement. It had previously chosen not to appeal from the Spencer Foods settlement.

settlement agreements and proposed settlement agreements are the business of the parties to the agreements and to the reviewing courts alone and non-settling defendants have no legal right to challenge a settlement between the plaintiffs and one of several co-defendants. *See, e.g., Cobb v. Atych*, 539 F.2d 297, 300 (3rd Cir. 1976), cert. denied, 429 U.S. 1103 (1977); *Utility Contractors Ass'n, Inc. v. Toops*, 507 F.2d 83, 85-86 (3d Cir. 1974) (observing that "[t]his small point of appellate procedure has not often been litigated, probably because it is so elementary"). Applying this principle, all the courts to consider the question, including the Fifth Circuit in this case (A41-44), have concluded that a non-settling defendant in a class action has no standing to object to a settlement between the plaintiff class and another defendant. *See, e.g., In re Nissan Motor Corp. Antitrust Lit.*, 552 F.2d 1088, 1103 n. 17 (5th Cir. 1977); *In re Ampicillan Antitrust Lit.*, 82 F.R.D. 652, 655-56 (D.D.C. 1979); *Williamsburg Fair Housing Committee v. New York City Housing Authority*, 450 F. Supp. 602, 607 (S.D.N.Y. 1978); *Seiffer v. Topsy's Int'l, Inc.*, 70 F.R.D. 622 (D. Kansas 1976); *Wainwright v. Kraftco Corp.*, 53 F.R.D. 78, 81 (N.D. Ga. 1971).

## II. THERE HAS BEEN NO APPEALABLE ORDER AS TO PETITIONERS IBP AND MBPXL.

The August 21, 1978 order of the district court relating to the Spencer Foods settlement was not final, and therefore not appealable, with respect to petitioner IBP, the only co-defendant to appeal the order. The December 21, 1978 order of the district court relating to the Flavorland settlement was by its own terms only tentative and conditional, was not final with respect to any party, and therefore not appealable. The dismissal of these appeals by the Fifth Circuit represents no

more than a routine application of settled law relating to the final judgment rule of 28 U.S.C. §1291 and the collateral order doctrine of *Cohen v. Beneficial Loan Corporation,* 337 U.S. 541 (1949).

**A. The Spencer Foods Settlement**

As the Fifth Circuit correctly held, the order approving the Spencer Foods settlement does not end the litigation by fully determining the rights of IBP and is therefore not appealable by IBP as a final order (A43-44). *Darrow v. Southdown, Inc.,* 574 F.2d 1333 (5th Cir. 1978); *Goldstein v. Andreson & Co.,* 465 F.2d 972 (5th Cir. 1972).

**B. The Flavorland Settlement**

The argument that this Court is without jurisdiction to hear the appeals of IBP and MBPXL because of a lack of a final order applies with special emphasis to the challenge to the proposed Flavorland settlement. The order of the district court with respect to Flavorland did not, by its very terms, constitute a final disposition of the proposed settlement. On the contrary, it merely related to the initial step in the settlement and certification process—a mechanism for directing the mailing of notice of the proposed settlement to the members of the purported class and for scheduling a hearing "at which the settling parties could make a full record in support of the settlement and the absent class members could present any objections they might have." (A60) The conditional approval of both the temporary settlement class and the proposed Flavorland settlement were for this limited purpose and expressly made subject to reevaluation and final approval after full

hearing upon notice to the members of the purported class. (A23-27, A35-36) As the Fifth Circuit correctly observed:

> The settling parties have not reached first base. They are at the initial stage when the district court has conditionally approved a temporary settlement class subject to disapproval or redefinition at a later hearing. The settlement has not been approved and is subject to disapproval or modification at a larger hearing. (A60-61)

As the Fifth Circuit recognized (A61-63), a finding of non-appealability is largely mandated by the Court's recent decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), holding that an order refusing to certify an action as a class action is not appealable either under 28 U.S.C. §1291 or under the collateral order doctrine.[8]

Here, as in *Coopers & Lybrand*, the district court order is not appealable as a "final decision" under 28 U.S.C. §1291 because it would not "of its own force terminate the entire litigation." 437 U.S. at 467. The Flavorland order has in no way resolved the disputes between plaintiffs and the non-settling defendants and, because of its tentative and conditional nature, has not even disposed of the litigation between plaintiffs and Flavorland.

Nor is the Flavorland order appealable under the collateral order doctrine:

> An order passing on a request for class certification does not fall in that category. First, such an order is subject to revision in the District Court. Second, the class determination generally involves considerations that are

[8] Although *Coopers & Lybrand* involved an order refusing class certification, the Court's reasoning would appear equally germane to orders granting class certification. Indeed, in discussing the inappropriateness of permitting appeals from non-final orders, the Court observed that "the Courts of Appeals have correctly concluded that orders granting class certification are interlocutory." 437 U.S. at 476.

> 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' Finally, an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members. For these reasons, as the Courts of Appeals have consistently recognized, the collateral-order doctrine is not applicable to the kind of order involved in this case. 437 U.S. at 468-69. (citations and footnotes omitted).

These factors are particularly applicable to the Flavorland appeal since unlike *Coopers & Lybrand* the district court has not even had an opportunity to hold an evidentiary hearing to determine whether the formation of a permanent settlement class should be approved.

## III. UTILIZATION OF A SETTLEMENT CLASS TO ACCOMPLISH PARTIAL SETTLEMENT WAS IN CONFORMANCE WITH ACCEPTED AND USUAL JUDICIAL PROCEDURES.

Petitioner Farr has standing to appeal with respect to the Spencer settlement. However, his professed views of the merits of the litigation and its impact on the settlement class make him an inappropriate party to invoke this Court's discretionary review. Farr is not a proper plaintiff to raise the issues posed by the Petition in that he does not question the amount of the settlement, does not want the settlement proceeds distributed to class members, and is opposed to the merits of the litigation itself. (A58-59). Farr is, to say the least, an unusual candidate to represent the interests of the absent class members in this Court, or in any other.

Certiorari should be denied because the procedures implemented to accomplish settlement here are sanctioned by the

authorities. The overwhelming weight of such authority recognizes that the certification of a class for settlement purposes only is an effective and just means of resolving complex legal disputes. Thus, in *City of Detroit v. Grinnell*, 495 F.2d 448 (2nd Cir. 1974), the court faced the issue of a partial settlement of an antitrust class action prior to certification of the class for litigation purposes. The trial court had approved the proposed settlement over the vigorous objections of several members of the settlement class. After carefully reviewing the settlement class mechanism, the Court of Appeals affirmed the decision of the trial court. Further support for the use of settlement classes is provided by *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975) cert. denied 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed. 2d 93 (1975); *Greenfield v. Villager Indus.*, 483 F.2d 824 (3rd Cir. 1973); *Brucker v. Thyssen-Bornemisza Europe*, 424 F. Supp. 679 (S.D.N.Y. 1976), aff'd. 559 F.2d 1202 (2nd Cir. 1977); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269 (N.D.Cal. 1976), modified, 73 F.R.D. 289; *In re National Student Marketing Litigation*, 68 F.R.D. 151 (D.D.C. 1974); *Colson v. Hilton Hotels Corp.*, 59 F.R.D. 324 (N.D. Ill. 1972); *West Virginia v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970) aff'd. 440 F.2d 1079 (2nd Cir. 1971) cert. denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed. 2d 115; and *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 488 (J.P.M.D.L. 1968).

Petitioners have cited little authority for their attack on the propriety of the settlements.[9] *The Manual for Complex*

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[9] The sole reported case cited by Petitioners on this issue, *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967) is clearly inapposite. In *Philadelphia Electric* the court was concerned with the lack of notice to the settlement class members. Such notice was, of course, given here prior to court approval.

*Litigation*, extensively cited by petitioners, is not controlling authority but by its own terms only a guide. The section of the *Manual* so heavily relied upon by plaintiffs is noteworthy not for the guidance it provides, but for the infrequency by which it has been followed. The recommendations of the *Manual* are clearly designed to preclude collusion, individual settlements and "buy-offs", where the plaintiffs' counsel simply utilizes the class action device to benefit his individual clients, often at the expense of absent class members. Both the district court and the Fifth Circuit were satisfied that none of these potential abuses was present here.[10] It is not concerned with situations such as the one presented here in which two defendants are seeking to settle for substantial sums and the class action continues against the remaining larger and wealthier defendants.

The highly factual nature of determinations relating to certification and/or settlement of class actions, and the great discretion afforded district courts in making these determinations, underscore the reasons why this Court should not grant review. In this case the terms of the Spencer settlement were subjected to a full evidentiary hearing and were thereafter found by the district court to be "fair, adequate and reasonable [and] not collusive" (A-20).

Accepting review of the settlement issues in this case would involve the Court in a plethora of factual and discretionary matters which are more appropriately left within the domain of the district court. As the Second Circuit observed in *City of Detroit v. Grinnell*, supra:

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[10] Similarly, the Court in *City of Detroit v. Grinnell*, 495 F.2d 448 (2d Cir. 1974) also considered the admonitions of the *Manual* and rejected them as inapplicable to the facts of that case.

> . . . so much respect is accorded the opinion of the trial court in these matters that the Court will intervene in a judicially approved settlement of a class action only when objectors have made a clear showing that the District Court abused its discretion. 495 F.2d 448 at 455.

The Fifth Circuit was unpersuaded that Farr had made such a showing. Farr's Petition does not allege that the district court abused its discretion in approving the Spencer Foods settlement. On the contrary, the facts compel the conclusion that the district court, with full knowledge of the facts, acted fairly and reasonably.

The thrust of petitioners' challenge to the settlement class mechanism employed by the district court is its alleged prejudicial impact upon the court's consideration of litigation class certification issues. The alleged prejudice is not a matter which the non-settling defendants are entitled to raise in opposition to the Spencer settlement.[11]

First, the non-settling defendants' claims of prejudice are at this point purely speculative. The question of certification of a litigation class has been briefed and argued and is presently *sub judice* before the district court. Second, even if the district court decided issues involved in the litigation class question in ruling on the Spencer settlement, the non-settling defendants have not suffered a legally cognizable injury. Their position is no different from that of any litigant who finds that the court before which his case is pending has recently decided a factually or legally similar question in a man-

[11] Since the district court issued its order tentatively approving the proposed Flavorland settlement class after holding a week-long evidentiary hearing on the litigation class issue, the non-settling defendants' claims of prejudice apply only to the Spencer settlement.

ner adverse to him. See *Boston Tow Boat Co. v. United States*, 321 U.S. 632 (1944). Finally, if IBP and MBPXL believe the issue has been pre-judged by the district court, their proper procedural recourse is not to seek to overturn the Spencer settlement but rather to move to recuse Judge Taylor from ruling upon the litigation class issues.

## IV. ANY INJURY TO IBP FROM THE DENIAL OF ITS MOTION TO AMEND ITS ANSWER TO ASSERT A CROSSCLAIM FOR CONTRIBUTION IS TOO SPECULATIVE TO JUSTIFY SUPREME COURT REVIEW.

IBP seeks review of the Fifth Circuit's refusal to permit amendment of its answer to assert a claim for contribution against Spencer. The order denying IBP's motion is not an adjudication of IBP's right to seek or obtain contribution from Spencer; but merely determines that the claim for contribution can not be prosecuted in the context of the instant litigation.

Even if the order were a "final decision" (see Section II, *supra*) review by this Court would be premature. The claim of IBP *pendente lite* is an inchoate claim only: any cause of action for contribution will accrue, and the statute of limitations begin to run, only at such time as IBP had paid more than its "fair share" of plaintiffs' damages. *Huggins v. Graves*, 210 F. Supp. 98 (D.C. Tenn. 1962); *Falciani v. Philadelphia Transp. Co.*, 189 F. Supp. 203 (D.C. Penn. 1960). IBP's interest at this point is too speculative and contingent to make this an appropriate case to invoke certiorari jurisdiction.

## V. NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS ON THE ISSUE OF CONTRIBUTION AMONG CO-DEFENDANTS IN ANTITRUST ACTIONS.[12]

IBP asserts in its Petition that there is a conflict among the circuits with respect to the issue of whether contribution is available to antitrust defendants, citing *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979), rehearing denied (April 17, 1979). There is no such conflict posed in the context of this appeal inasmuch as the holding in *Professional Beauty Supply* does not determine the question of whether a claim for contribution can be asserted against a *settling* co-defendant.

*Professional Beauty Supply* was an antitrust action commenced against a wholesaler of beauty supplies, National Beauty Supply, Inc., which, in turn, commenced a third-party action against a manufacturer. The trial court dismissed the third-party complaint with prejudice for failure to state a claim upon which relief could be granted, and the Eighth Circuit reversed. The Court of Appeals noted that dismissal was proper only if it was "beyond doubt" that National could not prove any set of facts which would entitle it to relief, and concluded that this burden had not been met. *Id.* at 1188.

It is important to note that defendant National Beauty Supply, Inc., sought to assert a claim for contribution against an alleged antitrust wrongdoer *who had not previously been made a party* to the litigation. This is in stark contrast to the situation presented here, where the claim was asserted against a co-defendant on the eve of settlement. The Eighth Circuit

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[12] Respondents adopt the Brief in Opposition to Petition for Writ of Certiorari to United States Court of Appeals for the Fifth Circuit, *Westvaco Corp. et al. vs. Adams Extract Co. et al.* No. 79-972, to the extent that Brief addresses this issue.

specifically noted that it was not presented with the "problem of how to treat a joint tortfeasor who has settled in good faith". *Id.* at 1184. The court parenthetically addressed the issue of protecting settling defendants, and stated that the court "should be able to fashion [such] a rule of contribution", *id.*, citing authorities which would preclude contribution against settling defendants. On that basis, several courts have recently interpreted *Professional Beauty Supply* as prohibiting contribution against settling defendants. *Alabama v. Blue Bird Body Company*, No. 75-23-N (M.D.Ala., June 22, 1979), appeal docketed, No. 79-2667 (5th Cir. July 26, 1979); *In Re Fine Paper Antitrust Litigation*, MDL No. 323 (E.D.Pa. Aug. 3, 1979).

Petitioner IBP argues that *Professional Beauty Supply* governs the resolution of the contribution issue inasmuch as these lawsuits were initially filed in the District of Iowa (Eighth Circuit) and subsequently transferred to the Northern District of Texas. The rule, cited by IBP, that the law of the transferor forum governs the case arises in the context of conflicts among state law and does not require the application of the *federal* law of the transferor court subsequent to transfer. *In re: Pittsburgh & Lake Erie R. Co.*, 543 F.2d 1058 (3rd Cir. 1976). The logic of this distinction is particularly appropriate in transferred multidistrict litigation, where the transferee court, facing cases from a dozen or more jurisdictions, would need to make different determinations as to each of the transferred cases whenever a substantive issue arose. When these cases involve one class, such as here, resolution in favor of the law in one of the jurisdictions is obviously required. *Cf. Bott v. American Hydrocarbon Corp.*, 441 F.2d 896 (5th Cir. 1971).

The law concerning contribution among antitrust defendants is in an early stage of development. The Fifth Circuit is the only jurisdiction which has squarely faced this issue, and the issue presented is not ripe for review by this Court.[13]

## CONCLUSION

The Petition for Writ of Certiorari does not raise any issues concerning the partial settlement of the class litigation that warrant review by this Court. Indeed, as the Fifth Circuit held, Petitioners IBP and MBPXL are not proper parties to challenge either the Spencer Foods settlement or the proposed Flavorland settlement for, under well-settled principles, these non-settling defendants lack standing. It is also clear that there has been no appealable order with respect to either IBP or MBPXL; the orders relating to the settlements did not end the litigation by fully determining rights of the non-settling defendants.

While the challenge of Petitioners Farr to the Spencer Foods settlement is properly before this Court, that settlement was accomplished in conformance with accepted and usual procedures. The procedures implemented by the district court and sanctioned by the Fifth Circuit do not raise any issues that require resolution by this Court.

Petitioner IBP seeks review of the denial of its motion to amend pleadings to assert a claim for contribution. Review of the issue of contribution among antitrust defendants is not appropriate in the context of this case, for the reasons, *inter alia*, that the order denying the motion of IBP is not appealable and there is no conflict among the circuits.

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[13] It should also be noted that the question of contribution among antitrust defendants is before Congress for its consideration. Antitrust Equal Enforcement Act of 1979, S. 1468, 96th Cong., 1st Sess.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned counsel of record for defendant-respondent Spencer Foods, Inc. hereby certifies that on March 6, 1980, three (3) copies of this Joint Brief in Opposition to Petition For Writ of Certiorari to United States Court of Appeals For The Fifth Circuit, filed this day on behalf of certain defendant-respondents and plaintiff-respondents in this matter, were placed in the United States Mail, properly addressed to counsel of record for each party separately represented herein and first class or air mail postage prepaid, in compliance with Rules 33.1 and 33.3(b) of the Rules of Practice of the Supreme Court of the United States.

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Peter W. Sipkins